STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 2, 1999
v	No. 210717 Recorder's Court
GLENN E. SHAW, Defendant-Appellant.	LC No. 97-001113

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of bank robbery, MCL 750.531; MSA 28.799, and the trial court sentenced him as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twelve to thirty years' imprisonment. Defendant appeals as of right. We affirm the conviction, but remand for a determination of appropriate sentence credit.

I. Basic Facts And Procedural History

Defendant's conviction stemmed from evidence that he aided and abetted a bank robbery at a Comerica Bank at 2200 West Fort in Detroit in late-December, 1996, by driving the other two perpetrators to and from the bank.

At trial, Detroit Police Sergeant Melvin Williams testified that he questioned defendant at the police station in mid-January, 1997. According to Sergeant Williams, defendant wrote the following statement about his involvement in the robbery: "I dropped them off around the corner and they came out. And I drove to my house on Wetherby and split the money. We then went our separate ways." When then questioned by Sergeant Williams about the robbery, defendant claimed that he received about $500 from the robbery. Defendant also claimed that he used a blue Chevrolet for the robbery, and identified two other individuals as the two perpetrators shown in the bank's surveillance photographs of the robbery.

The sole defense witness was defendant. Defendant denied any participation in the robbery. Defendant claimed that he went to various motels, including the one at which he was arrested, for

"personal business" because he sells drugs. Defendant testified that he possessed a little over half an ounce of rock cocaine when he and his girlfriend were arrested. After the arrest, according to defendant, an FBI agent named Townley said that defendant and his girlfriend would be charged with drug possession, with intent to deliver, if defendant did not cooperate. Defendant further testified that, when he was questioned by Sergeant Williams about the robbery, Sergeant Williams said that he talked to agent Townley. Defendant claimed that he did not want his girlfriend charged and that he concluded that he would be "facing a whole lot of more time" if charged with a possession offense. Defendant claimed that, as a result, when questioned by Sergeant Williams, he made a false statement about participating in the bank robbery.

In rebuttal, State Police Detective-Lieutenant Del Christian testified that no contraband was seized from the motel room where defendant came from when defendant and his girlfriend were arrested. If narcotics had been in the motel room, according to Detective Christian, they would have been seized as evidence. Further, Sergeant Williams testified that he did not talk to FBI agent Townley about this case. Finally, FBI agent Townley testified that he was involved in the bank robbery investigation, but did not have a conversation with defendant about drugs and did not make any deals with him. Following these proofs and closing arguments, the jury found defendant guilty as charged of bank robbery.

II. Standard Of Review

A. Suppression Of Confession

The voluntariness of a confession presents an issue separate and distinct from the issue of whether *Miranda*[1] rights were knowingly and voluntarily waived. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). The voluntariness of a defendant's confession is a question of law. The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. In reviewing the trial court's findings, this Court must examine the entire record and make an independent determination with respect to the issue of voluntariness. However, deference is given to the trial court, recognizing its superior position to view the evidence. Hence, its findings will not be disturbed unless clearly erroneous. *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991). See also *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998).

Whether a statement is voluntary is determined under a totality-of-the-circumstances analysis. *Sexton*, *supra* at 66-68, and *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). The following factors are relevant:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or

> medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

B. Prosecutorial Misconduct

The test for determining if prosecutorial misconduct requires reversal is whether the defendant was denied a fair and impartial trial. Each case must be evaluated within the particular facts of the case. Where no objection is made, review is precluded unless the prejudicial effect could not have been cured by a cautionary instruction and the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The prosecutor's remarks are examined in the context made. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

When the issue pertains to improper questioning and there is no objection, relief will not be granted if a timely objection by defense counsel to the alleged improper questioning could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction. See *People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992) (failure to object to prosecutor's questions precludes appellate review absent manifest injustice).

C. Sentence Credit

Questions of law involving the interpretation of the sentence credit statute are reviewed de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). The sentence credit statute states:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [MCL 769.11b; MSA 28.1083(2).]

III. Suppression Of Confession

Defendant claims that the trial court erred in refusing to suppress his confession to the police. We disagree. Giving deference to the trial court's superior opportunity to determine the credibility of the witnesses at the *Walker*[2] hearing, we agree that defendant's statement was voluntarily made considering the totality of the circumstances. *Sexton*, *supra* at 66-68; *Mack*, *supra* at 17.

IV. Prosecutorial Misconduct

Defendant claims that the prosecution engaged in misconduct by repeatedly emphasizing that he was a "big" business drug dealer. Examining the prosecutor's use of the word "big" in context, we conclude that defendant has not demonstrated any basis for relief. Even if the prosecutor's repeated use of the word "big" after defendant denied being a "big" businessman was improper, a timely objection could have precluded further questioning along these lines. Further, there is no miscarriage of

justice as defendant opened the door to questioning about his alleged drug activities by using it as a defense, to help explain his inculpatory statement, and the trial court instructed the jury that the lawyers' arguments and questions were not evidence. The jury instructions sufficiently dispelled any unfair prejudice that may have resulted. *Bahoda*, *supra* at 281, n 38; *Green*, *supra* at 693. Contrary to defendant's assertions, the circumstances of this case are not analogous to the errors found in *People v Johnson*, 409 Mich 552; 297 NW2d 115 (1980), or *People v Springs*, 101 Mich App 118; 300 NW2d 315 (1980).

V. Sentence Credit

Defendant claims that the trial court erred in denying him sentence credit based on his "federal status." Although defendant did not object to the trial court's failure to grant sentence credit, we will consider this claim to prevent a miscarriage of justice. *People v Miller*, 182 Mich App 692, 694; 452 NW2d 882 (1990). We agree that defendant's federal status did not preclude sentence credit.

In this regard, we note that the prosecutor's claim that consecutive sentencing was intended or imposed by the trial court lacks record support. Rather, the trial court only considered defendant's federal status for the purpose of denying him sentence credit; neither the judgment of sentence nor the trial court's comments at sentencing indicate that consecutive sentencing was ordered. We also note that the prosecutor has not identified any statutory authority for consecutive sentencing in the context of defendant's federal status and has mischaracterized that status as "parole." The presentence report established that defendant was on federal "supervised release" status when he was arrested and that a detainer warrant was later signed by a federal judge for pending federal charges of bank robbery and a supervised release violation. Supervised release is a unique method of post-confinement supervision enacted by Congress. *Gozlon-Peretz v United States*, 498 US 395, 407; 111 S Ct 840; 112 L Ed 2d 919 (1991). The term of supervised release begins to run after the period of imprisonment, but does not run during periods when a person is imprisoned for a crime unless the imprisonment is for less than thirty days. 18 USC 3624(e). The term of supervised release is also subject to modification or revocation under 18 USC 3623.

We conclude that the prosecution has not established a legal basis for its position that defendant's sentence in the instant case is required to run consecutive to defendant's federal supervised release. Statutory authority is required for a trial court to impose a consecutive sentence. *People v Phillips*, 217 Mich App 489, 498-499; 552 NW2d 487 (1996). Because neither statutory authority for a consecutive sentence nor the actual imposition of a consecutive sentence by the trial court has been shown, we will review defendant's sentence credit argument under the assumption that he was not subject to, and did not receive, consecutive sentencing on account of his federal supervised release status.

The material question, then, is whether defendant was entitled to sentence credit under MCL 769.11b; MSA 28.1083(2). In this regard, we find that neither the issuance of the federal detainer warrant nor the existence of pending federal charges is dispositive of defendant's entitlement to sentence credit. *People v Adkins*, 433 Mich 732, 747-748; 449 NW2d 400 (1989). We also find that defendant's federal supervised release status does not preclude sentence credit under MCL 769.11b;

MSA 28.1083(2). Because defendant was not obligated to serve time under a prior federal sentence while incarcerated in Michigan, we hold that defendant was incorrectly denied sentence credit based on his federal status. Accordingly, we remand for modification of the judgment of sentence to reflect the appropriate amount of sentence credit for time served prior to sentencing due to defendant's inability to furnish bond for the offense of which he was convicted. MCL 769.11b; MSA 28.1083(2); cf. *People v Johnson*, 205 Mich App 144, 146-147; 517 NW2d 273 (1994).

Defendant's conviction is affirmed. The case is remanded for modification of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1985).